

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CHURCH OF THE WORD, a)
Missouri Benevolent Corporation,)
)
 Plaintiff,)
)
 vs.) Cause No.: 4:20-CV00671-SEP
)
 ST. LOUIS COUNTY, COUNTY)
 EXECUTIVE, DR. SAM PAGE, in his)
 official capacity only, et al.)
)
 Defendants.)

**PLAINTIFF'S NOTICE OR MOTION FOR VOLUNTARY
DISMISSAL WITHOUT PREJUDICE**

COMES NOW Plaintiff, through counsel, and states to the Court as follows:

1. Plaintiff provides notice of voluntary dismissal without prejudice under FRCP 41(a)(1)(A). Alternatively, Plaintiff requests that it be permitted to voluntarily dismiss this matter without prejudice under FRCP 41(a)(2). This filing is occasioned by the Supreme Court's order in *South Bay United Pentecostal Church, et al. v. Newsom, et al.*, 590 U.S._ (May 29, 2020).

2. FRCP 41 (a)(1)(A) allows a plaintiff to dismiss an action without a court order upon "a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." Such a dismissal is without prejudice, unless a plaintiff states otherwise or previously dismissed any federal or state court action based on or including the same claim. *See* FRCP 41(a)(1)(B).

3. Defendants' Motion to Dismiss was based on FRCP 12(b)(6). [Doc. 12, pp. 2-3]. The Court's subsequent dismissal was without prejudice and granted Plaintiff leave to file a first amended complaint. [Doc. 17].

4. “Because a motion to dismiss under Fed. R. Civ. P. 12(b)(6) is neither an answer nor a motion for summary judgment, its filing generally does not cut off a plaintiff’s right to dismiss by notice.” *In re Bath and Kitchen Fixtures Antitrust Lit.*, 535 F.3d 161, 166 (3rd Cir. 2008). In the context of Rule 41, the filing of an answer or a motion for summary judgment must be “construed strictly and exclusively.” *Safeguard Business Systems, Inc. v. Hoeffel*, 907 F.2d 861, 863 (8th Cir. 1990).

5. Because Defendants have not filed an answer or motion for summary judgment, Plaintiff has a right to dismiss without prejudice under FRCP 41(a)(1)(A) upon notice. *See Burton v. Express Scripts, Inc.*, No: 4:17-CV-02279-AGF (E.D. Mo. April 9, 2018) (granting a plaintiff’s request to voluntarily dismiss without prejudice under 41(a)(1)(A) after the complaint was dismissed without prejudice pursuant to a 12(b)(6) motion). Further, Plaintiff has not previously dismissed any federal or state action based on or including the same claim(s) raised in the underlying Complaint. [Doc. 1].

6. Alternatively, to the extent Plaintiff does not have a right to voluntarily dismiss without prejudice, Plaintiff requests that the Court allow Plaintiff to dismiss without prejudice under FRCP 41(a)(2). “A decision whether to allow a party to voluntarily dismiss a case rests upon the sound discretion of the court.” *Hamm v. Rhone-Poulenc Rorer Pharmaceuticals, Inc.*, 187 F.3d 941,950 (8th Cir. 1999). “In exercising that discretion, a court should consider factors such as whether the party has presented a proper explanation for its desire to dismiss.” *Id.*

7. Plaintiff requests a voluntary dismissal in light of the Supreme Court’s very recent orders in *South Bay United Pentecostal Church and Elim Romanian Church v. Pritzker*, No. 19A1046, 590 U.S. ____ (May 29, 2020).

WHEREFORE, Plaintiff respectfully requests:

- a. That the Court permit voluntary dismissal without prejudice pursuant to FRCP 41(a)(1);
- b. That, alternatively, the Court permit voluntary dismissal without prejudice pursuant to FRCP 41(a)(2); and
- c. For any other further or additional relief the Court deems appropriate under the circumstances.

Respectfully submitted,

/s/ David J. Gregory

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Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on June 2nd 2020, a copy of the foregoing and/or attached document was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all of the parties of record.

/s/ David J. Gregory

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